OCT 28 1952

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 112

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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Supreme Court of the United States

OCTOBER TERM 1952

No. 112

MORTON SOBELL,

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against

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PETITION FOR REHEARING

Your petitioner, Morton Sobell, respectfully prays for a rehearing of the order of this Court, dated October 13, 1952, denying his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Reasons for Granting Rehearing and Issuing the Writ

1. The Espionage Act was incorrectly construed by the courts below, to permit proof of "treachery and general intent to betray" to be offered as evidence of the essential specific intent to advantage a foreign nation, and as so construed and applied in this case, the Act is in conflict with the Treason Clause of the Constitution.

The Government's brief in opposition to the grant of certiorari herein correctly states, with respect to the statute under which petitioner and his co-defendants were tried and convicted:

> "The statute requires, as a separate element of proof, that the defendant have acted with 'intent or

> reason to believe that [the material taken] is to be used to the injury of the United States or to the advantage of a foreign nation'. Indeed, it was partly because of this explicit requirement that this Court sustained the provision against a challenge of indefiniteness. See *Gorin* v. *United States*, *supra*." (Br. opp. Nos. 111, 112, p. 34).

This "separate element of proof", namely, the intent to advantage a foreign nation, was described in the Solicitor General's brief in opposition herein as the "specific intent of the espionage statute" (Br. opp. p. 34). That the statute was required, as a constitutional matter, to involve proof of such intent, is demonstrated by the very same authority which the Solicitor General cited for the proposition "that Congress had the power to authorize the death penalty for wartime espionage. See *Cramer* v. *United States*, 325 U. S. 1, 45" (Br. opp. p. 39). For at that precise point of the *Cramer* opinion, the Court disclaimed intention to permit Congress to "dispense with the two-witness rule by giving the same offense another name". "Specified acts thought detrimental to our wartime safety" may be proscribed, *provided* the "trial thereof [be] focussed upon defendant's specific intent to do those particular acts" and provided that there be eliminated "the accusation of treachery and general intent to betray which have such passion rousing potentialities" (325 U. S. at p. 45).

The vice of the prosecution below, in this aspect, was that there was offered in the guise of proof of specific intent, none other than "the accusation of treachery and of general intent to betray which have such passion rousing potentialities".

The prosecution:

> "These defendants before you are parties to an agreement * * * to serve the interests of a foreign power which today seeks to wipe us off the face of the earth" (R. 1535).

"They were joined by the common bond of communism and devotion to the Soviet Union" (R. 1529) "worship and devotion to the Soviet Union *over our own Government*" (R. 1535).

The star witness:

"Loyalty to the Soviet cause • • • adhesive relationship • • • adhesive quality • • • adhere • • • adhere" (R. 982-3).

The trial judge:

"Testimony to the effect that the Communist Party is dedicated to furthering the interests of the Union of Soviet Socialist Republic" (R. 1558).

The Court of Appeals:

"An American's devotion to another country's welfare" (R. 1654-5).

There was nothing in the Bentley testimony, purporting to establish the "specific intent" required by the Espionage Act, which revealed more than the "general intent to betray" so eloquently condemned in *Cramer* for its "passion rousing potentialities". And the interpretation of the intent clause of the Espionage Act which this Court expressed in *Gorin* and the Court of Appeals in *United States v. Heine*, 151 F. (2d) 813, cert. den. 326 U. S. 727, is as incompatible with acceptance of a "general intent" in proof of a specific intent as the teaching of the *Cramer* case. For those decisions identified the specific intent to give an "advantage" as being limited to intent to give the type of advantage conveyed by the transmittal of *secret* information.

The *scienter* referred to in *Gorin* is carefully identified in the portion of Mr. Justice Reed's opinion upholding the Espionage Act against a claim of lack of definiteness (312 U. S. at pp. 27-8). The "advantage" referred to in the statute does not mean, as it was there expounded, merely "help" or "assist". A foreign government can be assisted

by the transmittal of published "reports relating to national defense" and yet in such case there would be "no reasonable intent to give an advantage" (id.). Referring to this portion of this Court's opinion, Judge Learned Hand stated in *Heine:*

> "Obviously, this could not mean that it may not be to the advantage of a foreign government to have possession of such information; it can only mean that, when the information has once been made public, and has thus become available in one way or another to any foreign government, the 'advantage' intended by the section cannot reside in facilitating its use by condensing and arranging it" (151 F. (2d) 813, 817).

The requirements of a statute thus authoritatively construed to be limited to intent to give the species of assistance furnished by *secret* information, are not met by proof of a "general intent" to give help, or ideological adherence. Whatever may be the adequacy of such proof of general intent in a treason prosecution, it was not proper, as a matter of law, to constitute proof of the specific intent required in the prosecution of which review is now sought.

And, under the Treason Clause, it would not be permissible so to construe and apply the Espionage Act as to permit compliance with the specific intent clause by proof of general treacherous intent. The Treason Clause is to be construed on the assumption that "more than a few of [the framers] were descendants of those who fled from measures against sedition and its ecclesiastic counterpart, heresy" (*Cramer*, 325 U. S. at p. 13). And its protection is not limited to those accused of adhering to an enemy declared as such by formal action of the Congress of the United States. So ruled an Attorney General who was a contemporary of the framers of the Constitution. The "cold war" and maritime conflict with the France of 1798 produced a ruling from Attorney General Lee that "France is our enemy, and to aid, assist, and abet that nation in her maritime warfare will be treason in a citizen or any

other person within the United States not commissioned by France" (1 Op. Atty. Gen. (Gilpin ed., 1841), pp. 49-50).

Constitutional doctrine of far-reaching effect has been articulated by this Court under the assumption of the existence of a state of "cold war" with the Soviet Union. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580 at p. 591. The equivalence between friend and enemy postulated by *Gorin* (312 U. S. at p. 29); the assumption by the trial judge that it was a "*hostile* nation" (R. 1607) which received aid and comfort from the defendants—an assumption accepted by the Court of Appeals as essential to considering the death sentences imposed below as conscionable (R. 1680)—bring the Treason Clause of the Constitution into play in this case. And that clause has vitality enough to require safeguards against perjury, passion and prejudice which were not employed in the instant prosecution of petitioner for "adhering" to a cold-war "enemy".

2. By intervening decision of substantial effect, the Court of Appeals for the District of Columbia has held that membership in a Communist (Trotzkyist) Party does not of itself establish ground for removal under the Loyalty Program; this decision is, in principle, in conflict with the holding below that mere membership in the Communist Party can be taken as proof of disloyal adherence, without proof of personal acceptance of particular disloyal doctrines by petitioner.

In *Kutcher* v. *Gray* (No. 11172, Oct. 16, 1952) the Court of Appeals for the District of Columbia passed upon a loyalty proceeding affecting an individual who professed membership in the Trotzkyist Communist Party, classified by the Attorney General (without such party having sought judicial review) as seeking to "alter the form of government of the United States by unconstitutional means".

Obviously, the administration of the loyalty program requires a degree of proof of lower quality than that embraced in a prosecution for conspiracy to commit espionage. It is commonly understood that the former is calculated

to eliminate "risks"; the latter to establish individual guilt.

Yet in the *Kutcher* case the Appeals Court of the District of Columbia declined to countenance what was affirmed by the Court of Appeals in the prosecution below: the imputation of "disloyalty", or intent to betray, from mere membership in a group purporting and holding itself out to be a political party, and which so far as any proof contained in this record goes, was never regarded by petitioner, in the entire period of his alleged membership from 1939 to 1941, as other than a legitimate political party.

The Court in *Kutcher* did regard "the Attorney General's designation of the Socialist Workers Party" as "competent evidence in the administrative proceedings against Kutcher" (slip. op. p. 11). But it regarded as "significant" that neither Congress nor the President has done anything to "alter the original scheme of the Loyalty Program" since March 21, 1947; it has always established "disloyalty to the Government" as the bar to employment *"rather than membership or activity in a designated organization"* (slip. op. p. 9). Most persuasive of this connection was the letter of Attorney General (now Mr. Justice) Clark, of November 24, 1947, to the Chairman of the Loyalty Review Board, transmitting his list of subversive organizations:

> "In connection with the designation of these organizations I wish to reiterate, as the President has pointed out, that *it is entirely possible that many persons belonging to such organizations may be loyal to the United States.*" (Emphasis supplied.)

This Court has often cautioned that its denial of certiorari is not to be construed in the remotest degree as a decision on the merits, or as containing any intimation as to what its decision on the merits might be, were the writ to issue. The issues raised by the petition denied herein are of a character that make it difficult to comprehend how errors as grave as those involved in the handling of the issue of the significance of mere Communist affilia-

tion could be permitted to remain undisturbed. The United States Attorney told the jury that "this case is one of the most important that has ever been submitted to a jury in this country" (R. 1512). Factors which account for limitation of the burden of this Court by the cautious exercise of certiorari jurisdiction in the routine criminal case, cannot be present in a case so characterized.

The Solicitor General's brief in opposition to *certiorari* here conceded the general invalidity of employment of evidence of propensity (Br. opp. p. 33). It was further conceded, in effect, that such inflammatory evidence as introduced below would be inadmissible where the issue is one of "general criminal intent". But the distinction attempted to be drawn in the brief in opposition to certiorari between admissibility of proof of propensity to show "general" intent on the one hand, or to show "specific intent" on the other, could have no bearing on whether proof may be made by *imputation alone* of a guilty intent in a case such as the present one.

The question of the permissible scope and area of proof by association or imputation of a criminal intent claimed to be shown by past Communist affiliation is one of the most pervasive and significant problems of federal evidence in the difficult times through which we are now passing. The difference in result to be found in the *Kutcher* case, and in *Commonwealth* v. *Peay*, 369 Pa. 72, 85 Atl. (2d) 426, as opposed to the approach of the Courts below, insistently calls for the exercise of certiorari jurisdiction in this case.

3. The actual degree of culpability of petitioner, even if the one witness against him be believed, is so slight as to render the sentence imposed upon him wholly arbitrary, and presents occasion for review of the issue of the power of federal appellate courts to modify criminal sentences: the question deferred in *Kawakita* v. *United States*, 343 U. S. 717, 744-745.

This petitioner has suffered, at every stage of the criminal proceeding against him, from the subordination of the issues peculiar to his case, to those issues presented by the trial, conviction, appeal and petition for review by the co-defendants Rosenberg, the alleged "atom spies". From the time of his arrest, and the coupling of that event with the prosecution of the Rosenbergs, he was stamped on the mind of the community from which the jurors were drawn as an "atom spy"; even upon denial of certiorari, the Solicitor General having submitted a single brief in opposition, the denial in his case was coupled with that of his co-defendants, instead of being set out by separate order.

Petitioner now faces thirty years imprisonment—in effect a living death—although the Court of Appeals divided as to whether his conviction should have been affirmed, and was unanimous in its view that if "two conspiracies were proved, then prejudicial error has been committed, for Sobell was jointly tried with major atomic energy spies" (R. 1664). It first became apparent at the close of the prosecution's case—and was ultimately stated by the Trial Court that petitioner was not an "atom spy". This Court has declined to review his contention that on such facts he was so deeply stained and unfairly impugned as to have made it impossible for him to get dispassionate consideration by the jury. In addition to this ground for certiorari asserted in the original petition, which we believe to be meritorious, we now make the contention: not hitherto advanced here in behalf of the petitioner, although raised

in the Circuit Court[1] that by no rational view of the sentencing power can the sentence of thirty years imposed upon him be justified. Having due regard to the maximum extent of his complicity under any aspect of the record, and the factors, or rather, absence of any factors advanced by prosecutor or Court at the time of imposition of sentence, there can not be any doubt that if tried and sentenced separately, a prison term of five years—perhaps seven—would be regarded as the most harsh permissible in the light of the circumstances of the case and the history of the actual exercise of the sentencing power under former 50 U. S. C. §32. The departure—the infliction of the maximum term of imprisonment—can be accounted for only in the context of a sentencing proceeding wherein the overwhelming fact of the imposition of the death sentence on co-defendants impelled the trial court to buttress that sentence by wholly unjudicial severity to petitioner. The gratuitous recommendation against parole only serves to reinforce this view.

In the circumstances, the Court of Appeals should have been free to modify the sentence. We urge that a proper setting exists here for this Court to declare the existence of that freedom: to hold, as it is entirely permissible to do, that 28 U. S. C. 2106 means what it says, and that in a proper case, a power to "modify" exists. The Court of Appeals took the view that "the Supreme Court alone is in a position to hold that Sec. 2106 confers authority to reduce a sentence which is not outside the bounds set by a valid statute (R. 675-6). Otherwise, it would have given

[1] Sobell's brief in the Circuit Court states, p. 31n:

"We respectfully submit that the learned court below was led into the same prejudiced attitude towards Sobell as that to which the prosecutor had successfully brought the jury by the joint trial. For the extreme sentence of thirty years' imprisonment—with gratuitous recommendation against parole—overshadowed though it may be by the fate of the Rosenbergs, cannot be rationally explained by reference to the worst that may be believed of Sobell, taking everything that Elitcher testified to as true and meaningful."

Section 2106 "serious consideration." There is nothing in the casually tossed-off dictum in *Blockburger* v. *United States,* 284 U. S. 299, 305, to prevent the result we urge; and it was made quite clear in *Kawakita* v. *United States,* 343 U. S. 717, that the question is for this Court an open one.

The Court of Appeals stated (R. 1674, n. 22) that "determination of a proper sentence—no easy task" should involve "a host of factors, including the unique fact of the particular defendant's life, conduct and character". But the sentence imposed on this petitioner was imposed without reference to a recommendation from the U. S. Attorney or probation report (R. 1619-20). It is obvious from the Record that it was based on but one factor: the gravity of the alleged offense of petitioner's co-defendants. The prejudice which we contend affected the jury, by reason of the unfair joint trial, seems likewise to have infected the Trial Judge.

CONCLUSION

The first and third grounds advanced herein for issuance of the writ are substantial, although not hitherto advanced in behalf of petitioner. The second ground is based on an intervening circumstance of substantial effect. It is respectfully urged that the Court's order herein of October 13, 1952, denying certiorari be vacated, on rehearing, and the petition granted.

Dated: October 28, 1952.

Respectfully submitted,

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Certificate

The undersigned, HOWARD N. MEYER, counsel for MORTON SOBELL, hereby certifies that this petition is presented in good faith and not for delay, and that it is restricted to grounds specified in Rule 33(2) of the Rules of this Court.

HOWARD N. MEYER.